United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-2207

To be argued by
SIDNEY MEYERS

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

JOSEPH RAYMOND WENZLER,

Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF APPELLANT, JOSEPH RAYMOND WENZLER

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UNITED STATES COURT OF APPEALS

For The Second Circuit

Docket Nos. 74-2207
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UNITED STATES OF AMERICA,

Appellee,

vs.

JOSEPH RAYMOND WENZLER,
et. al.,

Appellant.

APPELLANT, JOSEPH RAYMOND WENZLER'S BRIEF.

PRELIMINARY STATEMENT

On February 21, 1974, the Appellant and Eight others, were indicted in the United States District Court, Southern District of New York.

The Charges therein, as against the Appellant, were, as follows:

(a) Under Count One, thereof, he was charged with being an asserted Co-Conspirator with the other Defendants, in asserted violation of Sections 812, 841(a) (1) and 841(b)(1)(B) of Title 21, United States Code.

(b) In Substantive Count Five, he was charged with having intentionally and knowingly distributed and possessing with intent to distribute, a Schedule I controlled substance, to wit, approximately 320.26 milligrams of L.S.D., on or about January 15th, 1974, in violation of Title 21, United States Code, Sections 812, 841(a) (1) and 841(b)(1)(B); Title 18, United States Cide, Section 2.

(c) In Substantive Count Nine, he was charged with having unlawfully, etc. possessed with intent to distribute, approximately 295 tablets containing L.S.D., on or about February 12th, 1974, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).

The other Eight Defendants named in the Indictment, were charged as follows:

(a) Each was named as a Co-Conspirator under Count One.

(b) The Defendants, William Brandt II, David Ross Miley and John Godinsky, were named in Substantive Count Two, as having assertedly unlawfully, etc. distributed and possessing with intent to distribute, approximately 164.8 milligrams of L.S.D., on or about November 27th, 1973.

(c) The Defendants, William Brandt II, David Flores and Dean Peter Vavarigos, were named in Substantive Count THREE , as having assertedly unlawfully, etc. distributed and possessing with intent to distribute, approximately 27.11 grams of phencyclidine, on or about December 13th, 1973.

(d) The Defendants, William Brandt II, David Ross Miley and John Godinsky, were named in Substantive Count FOUR, as having assertedly unlawfully, etc. distributed and possessing with intent to distribute, approximately 665087.5 micrograms of L.S.D., on or about January 3rd, 1974.

(e) The Defendants WILLIAM BRANDT II and Jan Lang, were charged with the Appellant herein, under the aforesaid indicated Count FIVE of the Indictment herein.

(f) The Defendants, William Brandt II, David Ross Miley and Robert Bachia, were named in Substantive Count SIX, as having assertedly unlawfully, etc. distributed and possessing with intent to distribute, approximately 1800 dosage units of L.S.D., on or about February 12th, 1974.

(g) The Defendant, Robin Bachia, was named in Substantive Count SEVEN, as having assertedly unlawfully, etc. distributed and possessing with intent to distribute, approximately 10,000 dosage units of L.S.D., on or about February 12th, 1974.

(h) The Defendant, Marvin Thomas Goldstein, was named in Substantive Count EIGHT, as having assertedly unlawfully, etc. distributed and possessing with intent to distribute, approximately 4000 dosage units of L.S.D., on or about February 12th, 1974.

The Appellant herein pleaded Not Guilty to those Counts of the Indictment pertinent to him.

Before the start of the Trial on April 29th, 1974, before the Honorable Milton Pollack, District Judge, Southern District of New York, and a Jury, three of the named Defendants, to wit, Brandt, Godinsky and Bachia, took Guilty Pleas to various Counts affecting them, and a Fourth Defendant, Jan Lang, never went to Trial.

Consequently, the indicated Trial, which commenced on April 29th, 1974 and was concluded on May 8th, 1974, involved the Appellant herein and Defendants, Goldstein, Flores, Miley and Vavarigos, on the following Counts:

Count One- the Appellant Wenzler, and Defendants Goldstein, Flores, Miley and Vavarigos.

Count Two- the Defendant Miley.

Count Three- the Defendants Flores and Vavarigos.

Count Four- the Defendant Miley.

Count Five- the Appellant herein, Wenzler.

Count Six- the Defendant, Miley

Count Eight- the Defendant, Goldstein.

Count Nine- the Appellant herein, Wenzler.

At the conclusion of the Trial on May 8th, 1974, the Jury rendered a partial verdict, finding the Appellant, Wenzler guilty under Count Five, and the Defendant, Miley, not

guilty on Count Two. Since the Jury could not agree as to the guilt or innocence of the respective Defendants on the remaining Counts, the Honorable Court declared a Mistrial as to those Counts.

Although the Appellant had been found guilty of Count Five of the Indictment, sentenced thereon was deferred until the completion and outcome of the retrial on the indicated remaining Counts.

On June 17th, 1974, the Retrial of the remaining Counts commenced before the said Honorable Milton Pollack, District Judge, Southern District of New York, and a Jury.

The Defendants on said Retrial, and the remaining Counts involved, were, as follows:

Count One- the Appellant, Wenzler, and Defendants Goldstein, Flores, Miley and Vavarigos.

Count Three - the Defendants Flores and Vavarigos.

Count Four- - the Defendant, Miley.

Count Six- - the Defendant, Miley.

Count Eight-the Defendant, Goldstein.

Count Nine -the Appellant herein, Wenzler.

The Retrial was concluded on June 21st, 1974, and all of the indicated Defendants were found guilty of the pertinent Counts involved.

On September 9th, 1974, Judgment was rendered and filed against the Appellant, JOSEPH RAYMOND WENZLER, under which he was directed to be imprisoned for a period of

Four (4) Months on each of Counts 5 and 9, to run concurrently with each other, and placed on Special Parole under Section 841, Title 21 U.S. Code for a term of Two Years, to commence upon expiration of confinement. Imposition of sentence on Count One was suspended, and the Appellant placed on Probation for Two Years to run concurrently with the term of Special Parole and to follow the term of imprisonment imposed on Counts Five and Nine, on special condition that Appellant undertake Counsel as directed by the Probation Officer until such time as it is considered no longer necessary.

The Appellant was continued and allowed to remain at liberty, on the bail previously furnished, pending the Appeal herein, and he is so at liberty at the present time.

This Appeal was duly and timely taken by the Appellant, by the serving and filing of Notice thereof in the Office of the Clerk of the United States District Court, Southern District of New York, on the 11th day of September, 1974 and this Appeal is from the aforesaid Judgment of the Honorable Milton Pollack, District Judge, Southern District of New York, made and rendered on the said 9th day of September, 1974, convicting him of Counts One, Five and Nine of the Indictment herein.

POINT ONE

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS.

Prior to the start of the first Trial referred to, and by Motion filed on April 3, 1974 (18a & 19a) the Appellant moved to suppress, as evidence against him on the Trial below of, approximately 295 tablets of L.S.D., and any other property taken from the Appellant's apartment on or about the 12th day of February, 1974, as set forth in Count Nine of the Indictment herein, on the grounds that their seizure violated the Appellant's Constitutional rights under the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

An evidentiary hearing was held on the Appellant's Motion, on April 10th and 11th, 1974 (Pgs. 1-137 Minutes of Hearing of April 10th and 11th). At the conclusion of the hearing, the Court below (the Honorable Milton Pollack) denied the Appellant's Motions, in their entirety. (23 & 26 a)

The Appellant respectfully maintains that the denial of the Motions was and is in error, and the utilization of the evidence sought to be suppressed violated his Constitutional rights, and brought about his conviction on the Counts involved.

On February 12th, 1974, the Government's Agents went to the Appellant's apartment house, for the purpose of arresting him for an alleged drug offense assertedly committed by him on January 15th, 1974. They had no search warrant.

The Agents arrested the Appellant for that January 15th, 1974 asserted offense, while the Appellant was outside of and about to open the door to his apartment on the 12th day of February, 1974.

There is a divergence of testimony as to whether or not handcuffs had been placed on the Appellant at the point of the Appellant's arrest outside of his apartment. Both sides are in accord, that while the Appellant was under restraint and had been under arrest outside of his apartment, some people were descending down the steps of the apartment house, and would soon have reached the particular stairway landing where the Appellant and the arresting officers were located. At this point, there is a further conflict of testimony. On the one hand, the Appellant testified that he merely asked the Agents to surround him on the landing outside his apartment, since he had handcuffs on and did not want to be embarrassed by the people who were in the process of descending from the upper floor seeing him under the then prevailing conditions; on the other hand, the Government's agents stated that they did not place handcuffs on him outside the apartment, and that the Appellant asked to be taken into his apartment to avoid the embarrassment he feared.

The Appellant respectfully maintains:

(a) That, while the Government's Agents might have had probable cause to arrest the Appellant on February 12th, 1974, for an offense committed on January 15th, 1974, and apprehended the Appellant outside his apartment on February 12th, 1974 for the purpose of making that arrest, their entry into the Appellant's

apartment on the 12th day of February, and their search and seizure of the items sought to be suppressed, without a Search Warrant, was not an"incident to the arrest"for the January 15th, 1974 offense, and wholly violative of the Appellant's Constitutional Rights.

(b) That, while there may be a difference of opinion in the testimony on the suppression hearing, as to whether or not the Appellant invited the Government Agents into his apartment, or was compelled by them to open the apartment door and allow them entry, there seems to have been agreement that the basic and only reason for entry into the apartment was the avoidance of embarrassment to the Appellant; that, accepting the Government's Agents version as to how they got into the apartment for the purpose of discussion (although the Appellant denied and denies the same), it is obvious that the entry into the apartment was merely for a limited and specific purpose only, i.e., that the Appellant was to be keptthere for the fraction of time it would have been necessary for the couple then descending the upper stairway to have left the building. It was never intended nor contemplated that the entry into the apartment was to constitute permission for the agents to search the apartment.

(c) The Government's Agents maintained that once they had entered the apartment, the Appellant "voluntarily" gave them consent and permission to search the apartment. The Appellant denied that he did so. In any event, under the circumstances of the Appellant's enforced detention within the apartment, surrounded by the Agents, it can hardly be said that there was a "voluntary" consent to search. If anything, any "consent" was a result of psychological coercion, particularly when the testimony on the suppression hearing contains the admission by the arresting officer as to the approach he employed towards the Appellant; that he tried to induce him to become a Government "informer"; that he emphasized the difficulty the Appellant was in, etc.

(d) Inasmuch as it is conceded that the Appellant was under arrest at the time of his alleged "consent" to search, it is axiomatic that the Government bore a heavy duty to establish a "voluntary" consent to search. The Government failed in that respect and the suppression Motions should have been granted.

Lynumm vs. Illinois, 327 U.S. 528; Rogers vs. Richmond, 365 U.S. 534; Judd vs. U.S., 190 F2d. 649; Hubbard vs. Tinsley, 336 F2d. 854.

POINT TWO

THE COURT BELOW ERRED, ON THE FIRST TRIAL, IN REFUSING TO SUBMIT TO THE JURY THE FACTUAL QUESTION AS TO WHETHER OR NOT THERE HAD BEEN AN ENTRAPMENT OF THE APPELLANT IN RELATION TO THE CHARGE UNDER COUNT FIVE OF THE INDICTMENT.

As indicated, the Appellant was convicted under Count Five of the Indictment, on the first Trial herein.

In that Trial he raised the defense of entrapment, and, at the conclusion of the Government's case, moved that the issue as to whether or not there was entrapment should be submitted to the Jury for determination. This the Court refused to do, and that issue never reached the Jury. (699-702 Minutes of First Trial).

It is respectfully submitted that the Court below committed material error in refusing to allow the Jury to pass on the factual question of entrapment, or to issue instructions to the Jury in respect thereto.

HART vs. UNITED STATES,
396 F2d, 243.

The Appellant's conviction on Count Five, should, therefore, be reversed.

POINT THREE

THE GOVERNMENT FAILED TO ESTABLISH THE EXISTENCE OF A SINGLE CONSPIRACY. THE APPELLANT'S MOTION TO DISMISS THE CONSPIRACY COUNT, AND FOR A SEVERANCE SHOULD HAVE BEEN GRANTED.

The Indictment alleges a single conspiracy as having existed among the Defendants, for the purpose of trafficking in controlled substances, i.e. drugs.

Both in the first Trial (565-572) and the second Trial (569-578), the Appellant argued that the Government had failed to establish any conspiracy; that, at best the evidence tended to and did show a series of independent transactions, or multiple conspiracies.

If any conspiracy or "partnership" existed, it consisted of the Government's informant, Starbuck and the Defendant, Brandt. The Government set Starbuck up in business, by supplying Starbuck with funds to make purchases from drug sellers; it instructed Starbuck to engage in drug transactions with Brandt, knowing and condoning the payment of commissions to Brandt for each seller of drugs that the team of Starbuck and Brandt could corral.

As to the Appellant herein:

(a) Under Count Five of the Indictment, on which he was convicted on the first Trial, he was charged with the Defendant Brandt and Lang, of having made a drug sale to the Government's Agent on January 15th, 1974. There was no proof that this isolated transaction was in furtherance of any conspiracy alleged in the indictment; there was no proof that the Appellant had joined or was aware of any conspiracy between the Government's Agent,

Starbuck and Brandt;there was no proof that the isolated transaction of January 15th, 1974, was in furtherance of any conspiracy alleged in the Indictment. The only evidence adduced as to that transaction was that of a sale made by the Appellant ostensibly to a friend of the Defendant, Lang. There was no proof of any knowledge on the part of the Appellant that this "friend" of Lang was a Government Agent, nor that the Appellant was aware of either Brandt or Starbuck or that he had any knowledge of the partnership that existed between Starbuck and Brandt.

(b) The testimony on both Trials overwhelmingly established a series of independent transactions.

(c) As to the Appellant's conviction under Count Nine, here again there was no proof that the drugs allegedly in the possession of the Appellant on February 12th, 1974, and seized by the Government's Agents, was in any way related to or in furtherance of any conspiracy.

(d) If there was any conspiracy, which the Appellant denies, there was a series of such, in which the Defendant, Brandt was the figurative hub of the wheel, with individual spokes radiating from him to the other Defendants individually.

KOTTEAKOS vs. UNITED STATES, 328 U.S. 750.

The Appellant was submerged and literally indundated under the mass of testimony and exhibits introduced in evidence, in the Government's attempt to establish crimes with which the Appellant was not concerned nor involved, and psychologicallt and inescapably caused the Jury to feel that the evidence against the other Defendants supported the charges against the Appellant.

The danger of substituting a "feeling of collective culpability for a finding of individual guilt",

stated in U.S. vs. Bufalino, 285 F.2d, 408, 417 , had become a reality in the minds of the Jury. No amount of admonition on the part of the Court below or directions to the Jury to disregard testimony not affecting the Appellant, etc. could logically eradicate the natural effect on the Jury of all the non-related testimony, etc. they heard during this week long Trial and Retrial.

It is respectfully submitted that the absorption by the Jury, of all the non-applicable testimony that was heard concerning the Defendants other than the Appellant, prejudiced the Appellant to the point where he was denied a fair trial and proved a material and dominant factor in his conviction on the substantive Counts.

The Conspiracy Count should have been dismissed, The requested serverance, if granted, would have prevented the injustice done, and its denial was not only error, but prejudicial to the Appellant.

CONCLUSION

The Appellant's conviction on Counts One, Five and Nine of the Indictment herein, should be reversed and the Indictment dismissed.

RESPECTFULLY SUBMITTED

SIDNEY MEYERS
Attorney for Appellant,
JOSEPH RAYMOND WENZLER.

~~US COURT OF APPEALS, SECOND CIRCUIT~~

USA,
Appellee,

against

WENZLER,
Appellant,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 25th day of November 1974 at ~~Foley Sq~~ Foley Square, New York

deponent served the annexed Brief upon

Paul J. Curran

the in this action by delivering 2 true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 25th day of November 19 74

Robert T. Drin

ROBERT T. DRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0413950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975